Office Supreme Court, U.S.
FILED
MAY 14 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1961.

No. 914

MAIN LINE THEATRES, INC.,

Petitioner,

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, et al.,

Respondents.

309 DRIVE-IN CORP.,

Petitioner,

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

HARRY NORMAN BALL,
420 Six Penn Center Plaza,
Philadelphia 3, Pa.,
SYDNEY C. ORLOFSKY,
Counsel for Petitioners.

Martin & Lyle, 1025 Bankers Securities Bldg., Phila. 7, Pa.

INDEX

PAGE

Opinion of the Courts Below 2

Jurisdiction 3

Constitutional Provisions Involved 3

Questions Presented 4

Statement of the Case 5

Reasons Relied Upon for Allowance of the Writ 12

Point I. The decision of the Court below affirming judgment for respondents was erroneous in that the Court undertook to make a finding of fact, not found by the District Court Judge, and not inferable from his findings, but by imposing a quasi contract where none existed, as a matter of law, contrary to the decisions of this Court, the other circuits and the State wherein the alleged agreement was made 12

Point II. The respondents, having demanded a jury trial, were entitled to have all issues of fact, including factual issues relating to the defense of settlement, determined by a jury, and such right was not waived by the petitioners in submitting themselves to hearings pursuant to a motion to dismiss alleging an agreement of settlement. The District Court erred in making findings of fact, pursuant to such hearings, despite conflict in the testimony thereon 26

PAGE

Point III. The Court of Appeals erred in holding that the respondents' condition that settlement of petitioners' cases was conditioned upon settlement of eight other cases in a "package deal" to settle all ten cases was expressly assented to by petitioners and foreclosed petitioners' contention that they were not bound to settle both aspects of their suits, since such condition was not known to petitioners, was not accepted by them and was in violation of public policy 29

Point IV. The issues involved herein are of paramount importance to the continued enforcement of the Anti-Trust Laws and the preservation of the benefit derived in such enforcement by actions brought by private litigants seeking not only damages for injuries sustained, but elimination of future violations of the Ant Trust Laws. Under the facts, an agreement to settle the equitable demands of petitioners should not be inferred except for clear and compelling reasons .. 33

Conclusion 41

TABLE OF CASES CITED

Alden-Rochelle, Inc. v. American Society of C. A. & P., 80 F. Supp. 888, 898 (S D. N. Y. 1948) 37

American La France F. E. Co. v. Borough of Shenandoah, 115 F. 2d 866 (3rd Cir. 1940) 21

Apex Hosiery Co. v. Leader, 310 U. S. 469, 493 (1940) 39

Atlantic Co. v. Broughton, 146 F. 2d 480 (5th Cir. 1944) 19, 40

Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd., 369 U. S. 355, 7 L. Ed. 2d 798 (1962) 23

PAGE

Ball Engineering Co. v. J. G. White & Co., 250 U. S. 46, 57 (1919) 20

Baltimore & Ohio R. Co. v. United States, 261 U. S. 592 (1923) 18, 20

Bedford Cut Stone Co. v. Journeyman Stone Cutters' Association of North America, 274 U. S. 37, 54 (1927) 37

Bozant v. Bank of New York, 156 F. 2d 787, 790 (2nd Cir. 1946) 27

Cameron v. Eynon, 332 Pa. 529, 532 (1939) 17, 18, 21

Carpenter v. United States, 17 Wall. (84 U. S.) 489 (1873) 20

City of Morgantown v. Royal Insurance Co., Ltd., 337 U. S. 254 (1949) 28

Cohen v. Johnson, 91 F. Supp. 231 (M. D. Pa., 1950) .. 21

Colby v. Kline, 178 F. 2d 872, 873, 874 (2nd Cir. 1949) 27

Decorative Stone Co. v. Building Trades Council, 23 F. 2d 426 (2nd Cir. 1928), cert. den. 277 U. S. 594..... 16

Don George, Inc. v. Paramount Pictures, Inc., 111 F. Supp. 458 (W. D. La. 1951) 22, 23

Dowell, Inc. v. Jowers, 182 F. 2d 576 (5th Cir. 1951) ... 40

Emich Motors Corp. v. General Motors Corp., 340 U. S. 558, 569 (1951) 37

Ethyl Gasoline Corporation v. United States, 309 U. S. 436, 461 (1940) 35

First National Bank v. Hall, 11 Otto (101 U. S.) 43 (1880) 23

Gallant v. Waterman S. S. Corp., 90 F. Supp. 495 (S. D. N. Y. 1950) 22

F. E. Grauwiller Transp. Co. v. King, 131 F. Supp. 630 (E. D. N. Y. 1955), affirmed 229 F. 2d 153 (2nd Cir. 1956) 22

PAGE

Huntley v. Gunn Furniture Co., 79 F. Supp. 110, 114 (W. D. Mich. 1948) 23

P. W. Husserl Inc. v. Simplicity Pattern Co., 191 F. Supp. 55, 60 (S. D. N. Y. 1961) 39

Illinois Cent. R. Co. v. R. F. C., 68 F. Supp. 78 (W. D. Ky. 1946), affirmed 177 F. 2d 201 (6th Cir. 1947) .. 22

Kelley v. Everglades Drainage Dist., 319 U. S. 415 (1943) 25

Klaxon Company v. Stentor Elec. Mfg. Co., 313 U. S. 487 (1941) 17

Klebe v. United States, 263 U. S. 188, 191 (1923) 20

Kraft Foods Co. v. Commodity Credit Corp., 266 F. 2d 254 (7th Cir. 1959) 21

Kraushaar v. Leschin, 4 F. R. D. 144 (E. D. Pa. 1944) .. 27

Lawlor v. National Screen Service Corp., 349 U. S. 322 (1955) 16

LeMieux Bros. Inc. v. Tremont Lumber Co., Ltd., 52 F. Supp. 116 (W. D. La. 1943), affirmed 140 F. 2d 387 (5th Cir. 1944) 23

Milwaukee Mechanics Ins. Co. v. Ciaccio, 38 F. 2d 153 (7th Cir. 1930) 40

Mutual Life Ins. Co. of N. Y. v. Young, 23 Wall. (90 U. S.) 85, 107 (1875) 14

Perkins v. Hart, 11 Wheat. (24 U. S.) 237 (1826) 20

Ex Parte Peterson, 253 U. S. 300 (1920) 28

Quemos Theatre Co. v. Warner Bros. Pictures, 35 F. Supp. 949 (D. N. J. 1940) 39

Radovich v. National Football League, 352 U. S. 445, 454 (1957) 39

Raytheon Mfg. Co. v. Radio Corp. of America, 76 F. 2d 943 (1st Cir. 1935), affirmed 296 U. S. 459 (1935) .. 28

PAGE

Reich v. Vegex, Inc., 51 F. Supp. 99 (E. D. Pa. 1942), affirmed 137 F. 2d 647 20

Rubsam v. Harley C. Loney Co., 117 F. Supp. 164 (E. D. Mich. 1953), affirmed 217 F. 2d 353 (6th Cir. 1954), cert. den. 350 U. S. 834 22

Sablosky v. Paramount Film Distributing Corp., 13 F. R. D. 138 (E. D. Pa. 1952) 16

Schine Chain Theatres, Inc. v. United States, 334 U. S. 110 (1948) 37

Securities and Exchange Commission v. Chenery Corp., 318 U. S. 80 (1943) 19

Sogmose Realties, Inc. v. Twentieth Century-Fox Film Corp., (S. D. N. Y., 1954), 1954 CCH Trade Cases, ¶67,688 27

Standard Oil Co. of New Jersey v. United States, 221 U. S. 1 (1910) 39

Toebelman v. Missouri-Kansas Pipe Line Co., 130 F. 2d 1016 (3rd Cir. 1942) 27

Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp., 194 F. 2d 846 (8th Cir. 1952) 40

United States v. Addyston Pipe & Steel Co., 175 U. S. 211 (1899) 39

United States v. Borden Co., 347 U. S. 514, 519-20 (1954) 38

United States v. Crescent Amusement Co., 323 U. S. 173, 189 (1941) 37, 38

United States v. W. T. Grant Co., 345 U. S. 629, 633 (1953) 38

United States v. Loew's, Inc., 1950-1951 CCH Trade Cases, ¶62,573 (S. D. N. Y. 1950) 35

United States v. Mississippi Valley Generating Co., 5 L. Ed. 2d 268 (1961) 30, 31

United States v. National Association of Real Estate Boards, 339 U. S. 485 (1950) 35

PAGE

United States v. Oregon State Medical Society, 343 U. S. 326, 333 (1952) 38
United States v. Paramount Pictures, Inc., 334 U. S. 131, 148 (1948) 36
United States v. United States Gypsum Company, 340 U. S. 76 (1947) 35
United States v. Univis Lens Co., 316 U. S. 241, 254 (1942) 35
Utley v. Donaldson, 4 Otto (94 U. S.) 29 (1877) 24

Webster v. Upton, 1 Otto (91 U. S.) 65 (1875) 20
Wittlin v. Giacalone, 154 F. 2d 20 (Dist. of Columbia Cir. 1946) 27
Wolverine Ins. Co. v. Klomparens, 273 Mich. 493 40

Youngstown Steel Erection Co. v. McDonald Engineering Co., 154 F. Supp. 337 (N. D. Ohio, 1957) 14

STATUTES AND AUTHORITIES CITED

United States Constitution, Seventh Amendment 26

Clayton Act (15 U. S. C., Sec. 12, et seq.) 33, 34, 35, 37

Federal Trade Commission Act (15 U. S. C., Sec. 40, et seq.) 34

Sherman Act (15 U. S. C., Sec. 1, et seq.) 33, 34

Federal Rules of Civil Procedure, 28 U. S. C. A.:
Rule 15(d) 26, 28
Rule 38(d) 28
Rule 56 27

15 C. J. S. Contracts 714, 715, Sec. 3(a) 40

17 C. J. S. Contracts, Sec. 6, p. 324 22

PAGE

Restatement, Law of Contracts:
Sec. 5 21
Sec 19 14
Sec. 25 21
Secs. 32, 58 ..... 14, 16

Barnes: Theory and Practice of Antitrust Administration (January 1954), CCH Antitrust Law Symposium 1954 "How to Comply with the Antitrust Laws", p. 40 34

McDonald: "Proof of Conspiracy: The Prima Facie Rule", CCH Antitrust Law Symposium, 1952, pp. 59-77 37

Williston on Contracts (Rev. Ed.), Vol. 1:
Sec. 27 21
Secs. 37, 72 ..... 14, 16

APPENDIX

Judgment of the U. S. District Court 1a

Orders of the U. S. District Court 2a

Opinion of U. S. C. A. 3 ..... 4a

Order of U. S. C. A. 3 Denying Petitions for Rehearing 13a

Judgments of U. S. C. A. 3 ..... 14a

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1961.

No.

MAIN LINE THEATRES, INC.,

Petitioner,

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, WARNER BROS. PICTURES DISTRIBUTING CORP., RKO RADIO PICTURES, UNIVERSAL FILM EXCHANGES, INC., TWENTIETH CENTURY FOX FILM CORPORATION, COLUMBIA PICTURES CORPORATION, LOEW'S INCORPORATED, UNITED ARTISTS CORPORATION, AND ALLIED ARTISTS DISTRIBUTING CORP.,

Respondents.

309 DRIVE-IN CORP.,

Petitioner,

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, WARNER BROS. PICTURES DISTRIBUTING CORP., UNIVERSAL FILM EXCHANGES, INC., TWENTIETH CENTURY FOX FILM CORPORATION, COLUMBIA PICTURES CORPORATION, LOEW'S INCORPORATED, UNITED ARTISTS CORPORATION, BUENA VISTA FILM DISTRIBUTING CORP., ALLIED ARTISTS DISTRIBUTING CORP.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, MAIN LINE THEATRES, INC. and 309 DRIVE-IN CORP., respectfully pray that a Writ of Certiorari issue to review the final judgments of the United States Court of Appeals for the Third Circuit entered on January 16, 1962, affirming the judgments of the District Court of the United States for the Eastern District of Pennsylvania, and the appeals docketed in the said Court of Appeals as No. 13508 and No. 13509 respectively, and the order of the said Court denying rehearing entered on February 14, 1962.

OPINION OF THE COURTS BELOW.

The opinion of the District Court is reported at 189 F. Supp. 314 (102a-109a). The opinion of the Court of Appeals for the Third Circuit is reported at 298 F. 2d 801 (1962) (infra p. 4a).

JURISDICTION.

The judgment of the Court of Appeals was entered on January 16, 1962 (infra p. 14a). The Order denying the petition for rehearing was filed on February 14, 1962 (infra p. 13a). The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED.

U. S. C. Constitution, Amendment VII—Civil Trials.

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

QUESTIONS PRESENTED.

No. 1. In a suit by a motion picture theatre operator alleging conspiracy of the defendants in violation of the antitrust laws, and where the complaint demands pecuniary damages and equitable relief and a jury trial, and the motion picture operator agrees to accept a sum of money in settlement of his demand for pecuniary damages, is it not error for the District Court on motion to dismiss averring a settlement of the entire case and hearing held thereon without a jury, upon disputed facts, to order the suit dismissed in its entirety upon the payment of the sum so agreed?

No. 2. Where in such a case the District Court Judge fails to make a finding as to the exact agreement or intent of the parties, is it not error for a Court of Appeals, upon appeal from the District Court's order, to make a factual finding as to the intent of the plaintiff by imposing, as a matter of law, a quasi contract under which both the legal and equitable demands of the suit are held to be covered by the alleged settlement?

No. 3. Where on a motion to dismiss averring settlement of the entire case, after suit brought and hearing held thereon, a dispute in the facts relating to the alleged agreement of settlement is developed, should not the District Court refuse to rule on the motion and submit such disputed facts to a jury where jury trial has been demanded?

STATEMENT OF THE CASE.

These suits involve claims by petitioners for damages and equitable relief by reason of various alleged conspiracies and other actions in violation of Sections 1 and 2 of the Sherman Act arising from respondents' practices in distribution of film to plaintiffs.

After hearing before the Hon. Francis L. Van Dusen of the United States District Court for the Eastern District of Pennsylvania on motion of respondents (66a), Judge Van Dusen, upon a finding that petitioners on May 23, 1960, through their attorney orally entered into a settlement agreement, ordered the respondents to pay $10,000. into the registry of the Court and to submit certain releases to respondents (102a, 110a). Upon the carrying out of the above orders and petitioners' refusal to sign the submitted releases, Judge Van Dusen ordered dismissal of the actions with prejudice (111a). Appeals to the Court of Appeals followed.

The facts as presented at the hearing and by the records of the actions, disclose the following:

On July 7, 1958 and May 27, 1959, Complaints were filed by Edwin P. Rome, Esq., on behalf of Main Line Theatres, Inc., and 309 Drive-In Corp., respectively (1a, 3a). These Complaints charged respondents with conspiracies in discriminating against petitioners in the allocation of unreasonable runs and availabilities for respondents' films. The Complaints alleged that the uniform, parallel practices of the respondents-distributors of substantially all desirable film and without which virtually no theatre and certainly petitioners' threatres can be operated successfully—had the effect of freezing petitioners' theatres into a subservient,

discriminatory run (5a, 7a). A demand for jury trial was attached to each complaint.

Petitioners demanded both damages and injunctive relief (10a).

White & Williams are petitioners' general counsel. Mr. Rome was retained solely to prosecute these antitrust suits (17a, 57a). In addition, Mr. Rome represented other plaintiffs in eleven other private antitrust suits pending in the Eastern District Court against the same respondents (75a).

One of these other suits, Colonial Amusement Company v. Columbia Pictures, et al., the only such case assigned to Judge Van Dusen (76a), was the first to be listed for trial (May 1960). During discussion of the settlement of the Colonial case, defendants took the position that they would refuse to settle any one of the cases unless ten of them which involved Pennsylvania theatres were settled (23a, 38a, 50a, 91a). This included petitioners' cases. Respondants' counsel had no authority to settle any case individually or allocate the lump sum authorized by respondents.[1]

Petitioners were informed by Mr. Rome that he had an offer in settlement from respondents of $10,000. for petitioners' damages. Petitioners acquiesced to $10,000. for the damages without knowledge that respondents had authorized settlement only upon execution and delivery of certain covenants acquiescing in and declaring "reasonable" their distribution practices (92a, 93a).

There was no discussion of, agreement about, or authority given Mr. Rome with respect of any covenants acquiescing

---

[1] (38a)

THE COURT: "... as I remember it, that the defendants consistently said that they would not settle unless they settled ten ..."

(50a):

MR. ADAMS: "... There is no authority to offer an allocated portion of the $95,000."

in or approving respondents' distribution practices. Mr. Rome firmly maintained throughout the hearing in the District Court that no settlement of petitioners' cases was reached on May 23.[3]

On Friday, May 20, 1960, respondents were willing to pay $85,000. as settlement for all ten Pennsylvania cases. (23a, 26a). Mr. Rome informed respondents that he could not effectuate the package settlement for less than $95,000. (31a).

By Monday, May 23, respondents were able to raise their offer. The record indicates a dispute exists as to the sum offered on that date. Respondents' counsel testified that on that date the amount offered was $90,000. (82a, 83a).[3] Mr. Rome, on the other hand, stated that respondents had then agreed to pay $92,500. (26a, 32a).

Counsel for the respondents did not communicate agreement upon the $95,000. figure to Mr. Rome (offered by Mr. Rome on May 20) until after August 22, 1960 (67a, 79a).

(34a)

MR. ROME: "... there were areas of uncertainty in the situation and with the best of good faith on both sides ..."

(42a)

THE COURT: "And all Mr. Rome is saying is that so far as he can remember, he did not have a binding agreement in this matter ..."

(53a-54a)

MR. ROME: "... It seems to me that the actuality of the matter was that at that time I said I will do what I can to get it settled. Why don't you send over the papers, and I will see what I can do, but there was no commitment, because according to their own recollection there was still the outstanding problem of the amount, and it comes to me as a shock to learn that we consider cases settled when we have a difference of amount."

(59a)

MR. ROME: "... I always said at that time it is going to require $95,000 to do it. Now, you come along with $95,000 several months after the event, which necessarily puts it in a different posture than it was earlier."

[3] At the pre-trial conference on Sept. 12, 1960 he stated that $92,500 was offered on May 23 (26a).

Mr. Rome was to have sole responsibility for the allocation of the funds to his individual client-plaintiffs (43a, 54a).[4]

The total settlement figure was still open, but counsel, feeling that they were close to a settlement, on May 23 informed Judge Van Dusen, Trial Judge of the Colonial Amusement case, that that case would not be tried (60a). On May 23, in a letter to his New York counsel, Mr. Adams informed them that a counsel fee question was still open (20a, 21a).

Previously, respondents had transmitted drafts of releases containing covenants declaring the reasonableness of respondents' licensing procedures to Mr. Rome, but he did not look at the drafts until after May 23 (81a). On May 25, Mr. Rome mailed the drafts to Mr. V. C. Smith, the managing officer of petitioners (76a). Immediately upon receipt thereof on the morning of May 26, Mr. Smith telephoned Mr. Rome and informed him that he was disturbed by and violently opposed to the drafts and that the settlement was unacceptable (76a, 85a, 86a). Mr. Smith did not hear again from Mr. Rome's office until August 19 (80a, 81a). In the meantime, Mr. Smith proceeded to consummate negotiations for the sale of the two theatre operations (84a).

The proposed settlement agreements stated in Paragraph 3 thereof as follows: "309 Drive-In Corporation agrees that its present availability and the present procedures pursuant to which it licenses motion pictures is reasonable." This

---

[4] (43a):

THE COURT: ". . . but it seems to me that the only problem now that you have got is how much you are going to assign to those cases.

MR. ROME: On that, it was always understood . . . that the allocation of the amounts was to be my problem. . . ."

(44a):

MR. ADAMS: ". . . we did not want to participate in Mr. Rome's evaluation of the cases."

covenant was to be binding upon any successors or assignees (70a-71a, 78a). This covenant negated all of petitioners' charges in the complaints and relegated the theatres to the very run and availability from which it sought relief.

Respondents' counsel testified that at no time prior to the August discussion with Mr. Rome did he have authority to enter into any settlement agreement without execution and delivery of the above covenant (92a). Respondents would not settle without this covenant (92a-93a). There is no evidence that Mr. Rome ever purported to bind his clients to such a settlement agreement; instead, he scrupulously reported to his adversaries and to the Court the refusal of his clients to settle upon such a condition. Mr. Rome communicated petitioners' dissatisfaction with the agreements to respondents' counsel during the week of May 23 (79a-80a) and to the Court by letter of July 8 (77a, 97a-98a). However, the agreements were never redrafted (36a) and at no time prior to the hearing on respondents' motion to dismiss did respondents ever offer to settle on any other basis (83a, 92a).

There were no conversations or writings between Mr. Rome and Mr. Smith in which Mr. Rome was authorized to slot these valuable theatre operations forever into their assigned availability and run for $10,000. or any other sum. In their conversation on May 26, Mr. Smith told Mr. Rome, in substance, that he was negotiating for the sale of the theatres and did not want the new operators to be bound "forever and a day into the future" as the amount of consideration for the settlement could not possibly warrant freezing the runs of the theatres (80a).

Mr. Rome did not press petitioners' objections vigorously as he felt that the pending negotiations for settlement of all the cases, "turned critically upon the question of amount" (81a, 82a).

Counsel for respondents had knowledge throughout the

settlement negotiations that Mr. Rome was not petitioners' general counsel (28a) and knew as early as March or April that Mr. Smith was negotiating for the sale of the two subject theatres to certain purchasers (28a, 62a); and that purchasers under the provisions of the covenants would be bound if petitioners executed the aforesaid covenants.

On July 22, petitioners and the purchasers consummated the transfer of the theatres (84a). The purchasers had been operating the theatres throughout July (84a). Mr. Rome did not participate in the transfer of the theatres (80a). Neither petitioners, their general counsel or their purchasers were then aware of any charge to the effect that the cases had been settled on May 23, or at any other time. The dockets were barren of any notations with respect to settlement, discontinuance or dismissal.[5]

In a response to Judge Van Dusen's letter of June 29, Mr. Rome stated in his letter of July 8 (97a-98a), inter alia:

> ". . . Your Honor will recall that there was a question of a difference in the amount to be attributed to the ten cases as distinct from the thirteen. This has been one source of my problem. Another has been the wording of the form of release which has caused major doubts and reservations in the minds of certain clients which I have been attempting to resolve. . . ."

Mr. Rome, on July 25, in response to a telephone message from Judge Van Dusen, wrote to the Judge as follows (99a-101a):

> ". . . The remaining cases are at the moment unsettled because there has been expressed reluctance or

---

[5] United States District Court for the Eastern District of Penna. Local Rule No. 12.

inability on the part of the principals of the companies involved to accept the terms offered.

. . .

. . .

. . .

Main Line Theatres, Inc. vs. Paramount Film Distributing Corporation, Civil Action No. 24983.

309 Drive-In Corp. vs. Paramount Film Distributing Corporation, Civil Action No. 26409.

. . .

. . .

. . ."

Three days before the above formal report to the Court that the cases were *unsettled*, the theatres had been sold (84a).

On July 29, Mr. Smith sent written notice to respondents of the transfer of the theatres (84a).

On August 10, Mr. Rome communicated with respondents' counsel in an effort to get agreement on the $95,000. package settlement agreement (37a). It was not until after August 22 that Mr. Rome learned that respondents' counsel had authority to offer $95,000. (79a).

On August 19, Mr. Rome's associate, in a telephone conversation with Mr. Smith, which was the first communication between Mr. Rome's office and petitioners since May 26, was informed that the theatres had been sold. Mr. Smith reiterated that there could be no settlement and indicated that he could no longer negotiate any settlement (78a, 79a, 81a).[6]

Mr. Rome communicated this fact to respondents' counsel, suggesting that the remaining eight cases be settled nonethe-

---

[6] Plaintiffs agreed to cooperate with and permit plaintiffs' purchasers to press for the relief demanded in the complaints (86a-87a).

less (17a). After Labor Day respondents' counsel informed Mr. Rome that respondents were unwilling to carry out the settlement with the remaining eight plaintiffs (18a-19a).

A pre-trial conference was held between counsel and Judge Van Dusen on September 12 (14a). At that time Judge Van Dusen suggested that respondents file motions for dismissal in the instant two actions and a petition permitting the payment of $85,000. into court for the settlement of the other eight cases (38a-39a, 48a, 50a, 65a).

After a hearing on respondents' motions, Judge Van Dusen found that Mr. Rome had authority to settle and did settle petitioners' cases on May 23 (102a-109a). He ordered payment of $10,000. into the registry of the Court, tender of releases to petitioners without the covenant agreeing to the reasonableness of respondents' procedures and dismissal of the actions with prejudice. Appeals to the Court of Appeals followed.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

Point I. The decision of the Court below affirming Judgment for Respondents was erroneous in that the Court undertook to make a finding of fact, not found by the District Court Judge, and not inferable from his findings, but by imposing a quasi contract where none existed, as a matter of law, contrary to the decisions of this Court, the other circuits and the state wherein the alleged agreement was made.

The Court of Appeals erred in failing to distinguish between a contract implied in fact and a quasi contract. Thus, in the absence of proof of agreement, promise, or apparent

intention of the petitioners, the majority of the court concluded that "in such circumstances a reasonable person agreeing, without any expression of limitation, to accept a sum in settlement of the litigation should and reasonably would understand that both aspects of the suit were covered by the settlement" (298 F. 2d 801 at 803).

There were neither words nor conduct of the petitioners which would reflect the apparent intention of petitioners to undertake the performance in question and no such implied promise was supported by the testimony. The majority of the Court of Appeals merely imposed the obligation as a matter of law and in spite of any intention petitioners may have had to the contrary. Indeed, in justifying its conclusion, the majority of the court relied upon *the presumed intention of the respondents*, saying (298 F. 2d 801 at 803):

> "Certainly, a defendant offering a sum in settlement of a suit asking, among other things, for an injunction against certain conduct, would not understand that a similar demand could be asserted the day after settlement. This reasonable understanding [of Respondents, not Petitioners] determines the meaning of the assent expressed by the parties here."

It is thus evident that such reliance as the court placed on the intention of the parties was placed solely upon the intention of respondents and not upon the intention of petitioners.

The decision of the majority was in direct conflict with cases in the Third Circuit, in conflict with the decisions of other circuits on the same issues; contrary to the decisions of this Court and in direct conflict with the rules of law applicable set forth by the Supreme Court of Pennsylvania.

In the instant case there was no enrichment at the expense of another, no equitable ground to bind petitioners to

an agreement never made or intended, and no reason to apply the principle that whatever it is certain that a man ought to do, the law supposes him to have promised to do.

There can be no contract in the true sense, that is, as distinguished from quasi or constructive contracts, in the absence of the element of agreement, or of mutual assent of the parties: *Mutual Life Ins. Co. of N. Y. v. Young*, 23 Wall. (90 U. S.) 85, 107 (1875). In the latter case this Court said as to assent:

> "*The requisite assent must be the work of the parties themselves. The law cannot supply it for them. That is a function wholly beyond the sphere of judicial authority.*" (Emphasis supplied.)

It is elementary that in order to constitute a binding contract there must be a manifestation of assent by the parties thereto. *Restatement of the Law of Contracts*, Sec. 19. There must be a definite offer and an unequivocal acceptance of it. *Restatement of the Law of Contracts*, Sec. 32, 58; *Williston on Contracts*, Sec. 37, 72; *Youngstown Steel Erection Co. v. McDonald Engineering Co.*, 154 F. Supp. 337 (N. D. Ohio, 1957).

The majority of the Court below suggests that "there was no formal offer and no formal acceptance. Neither was there a written settlement agreement. But the record warranted a finding that the negotiations reached a point where mutual assent had been expressed orally to settle *the litigation* for $10,000." Leaving aside the element of formality, there was no evidence in the record to warrant a finding that the negotiations had reached a point where *mutual assent* had been expressed. The fact is that on May 23, 1960, the date on which the District Court found the agreement was effected, petitioners had merely indicated a willingness to accept $10,000. *as damages*. The damage ele-

ment was wholly insignificant in comparison to the far more important burden and detriment of accepting, for an indefinite period, the status quo of the theatre runs imposed by conspiracy and the continued stultification of petitioners by requiring them to declare that the challenged distribution techniques of respondents were reasonable; and the acceptance of a material depreciation in the value of as well as the impairment of the possibilities of the sale of the petitioners' theatres, at their true value.

The petitioners had not, on May 23, 1960, or at any other time, agreed to forfeit or release their statutory rights in equity to secure an appropriate order restraining and enjoining respondents from pursuing the unlawful conspiracy in violation of the anti-trust laws--the pursuance of which had already caused the monetary damage which petitioners were then willing to compromise at $10,000.

As Circuit Judge McLaughlin pointed out in his dissent in the instant case, the acceptance of the objectionable language in the release submitted "would have cut the heart out of their motion picture operation." (298 F. 2d 801 at 805).[7]

---

[7] In his dissent Judge McLaughlin analyzed his grounds for dissenting as follows:

"The claim was for the damage sustained by plaintiffs arising out of the unreasonable conduct and actions of the defendants. That was the claim that plaintiffs agreed to settle. But they never agreed in addition to that that they would wipe out their theatres' right to function in the future without (according to their contention) being hamstrung by the unreasonable procedures of defendants. However, the latter at the time of the so-called oral agreement had every intention of including that important plaintiffs' claim in their settlement of the cases. It was a vital part of the release they drew and presented to the plaintiffs for execution. It was not until the plaintiffs persisted in refusing to accept the defense version of release that the defendants offered to waive the particular clause. The final position of the defendants was just that, namely, they waived what to them had been at the very least a substantial element of the settlement. There was and is no contention on their part that they had been trying to simply add the clause if possible or anything of that kind. **The release sent plaintiffs by them was their idea of the con-**

Assuming that there was no formal offer or formal acceptance and no need for formality, it is well settled that there is a need for a "*definite*" offer and an "*unequivocal*" acceptance. (See *Restatement of the Law of Contracts*, Sec. 32, 58; *Williston on Contracts*, Sec. 37, 72). The offer here made did not with any *definiteness* include the compromise or relinquishment of petitioners' statutory rights to equitable relief and clearly there was no *unequivocal* acceptance of an offer including such a compromise or relinquishment. Neither the trial judge nor the majority of the Court of Appeals find or refer to a *definite offer being made or discussed relating to the equitable demands made in the action.* Yet, the majority in the Court of Appeals, clearly recite:

> "Here the suit contained a demand for injunctive prohibition of future wrongful conduct *as well as a* claim for money damages for alleged past misconduct" (298 F. 2d 801 at 803). (Emphasis supplied.)

It is now well settled that a claim for treble damages under the anti-trust laws and a claim for injunctive relief from the conspiracy giving rise to the damages are separate and distinct causes of action based upon separate sections of the statute: *Decorative Stone Co. v. Building Trades Council*, 23 F. 2d 426 (2nd Cir., 1928), cert. den. 277 U. S. 594; *Lawlor v. National Screen Service Corp.*, 349 U. S. 322 (1955); *Sablosky v. Paramount Film Distributing Corp.*, 13 F. R. D. 138 (E. D. Pa. 1952).

---

templated settlement. It was never acquiesced in by plaintiffs. There was therefore no meeting of minds between the parties; no final settlement agreement. Later on, after plaintiffs had rejected the defense proposal as set out in the release, it was too late for the defendants to then attempt to waive their 'reasonable procedure' language. At that stage defendants were in fact submitting a new offer of settlement. Plaintiffs declined this as they were entitled to do." (Emphasis supplied.)

Obviously troubled by recognition of the fact that the case involved more than one cause of action, the majority of the Court of Appeals has created an improper standard of determining mutuality of assent by invoking a doctrine wholly unsupported by the cases, whether reference be had to state or federal law, and imposing in effect a quasi-contract where no basis for such imposition was warranted.[*]

Whether a federal court applies its own understanding of federal contract principles or whether it is guided by Pennsylvania contract law, which a Pennsylvania court undoubtedly would apply to this "settlement agreement" having all of its significant contacts with Pennsylvania, the rules of law applicable would be the same. (See *Klaxon Company v. Stentor Elec. Mfg. Co.*, 313 U. S. 487 (1941).) The application of the appropriate rules of law require that a clear distinction be made between a contract implied in fact and a quasi contract, a distinction completely disregarded by the majority in the Court of Appeals, in imposing a quasi contract on the petitioners.

The distinction is clearly set forth in the leading Pennsylvania case of *Cameron v. Eynon*, 332 Pa. 529, 532 (1939):

> "A quasi contract arises where the law imposes a duty upon a person, not because of any express or implied promise on his part to perform it, but even in spite of any intention he might have to the contrary. A quasi contract which is a fictional contract, is not to be confused with a contract implied in fact, which is an *actual* contract, and which arises where the parties agree upon the obligations to be incurred, but their

---

[*] Thus without citation of authorities or cases to support the novel doctrine, the majority in the Court of Appeals have concluded that:

> "In such circumstances a reasonable person agreeing, without any expression of limitation, to accept a sum in settlement of the litigation should and reasonably would understand that both aspects of the suit were covered by the settlement" (298 F. 2d 801 at 803).

> intention, instead of being expressed in words, is inferred from their acts in the light of the surrounding circumstances." (Emphasis original.)

A similar distinction was noted by this Court in *Baltimore & Ohio R. Co., v. U. S.*, 261 U. S. 593 (1923), where the Court said (p. 597):

> "The 'implied agreement' contemplated by the Dent Act as the basis of compensation is not an agreement 'implied in law' more aptly termed a constructive or quasi contract, where, by fiction of law, a promise is imputed to perform a *legal duty*, as to repay money obtained by fraud or duress, but an agreement 'implied in fact' *founded upon a meeting of minds*, which although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding." (Emphasis supplied.)

Conceding that if the suit had involved only a claim for money damages, the effect of any undertaking to "settle" the suit for a stated sum would be merely a promise to forego a money claim, the majority of the Court of Appeals imposes by law an additional factual finding not found by the trial court, and not a justifiable factual inference from any fact found, namely, that as a reasonable person each of the Petitioners would understand that both aspects of the suit were covered by the so-called "settlement" (298 F. 2d 801 at 803).

It justifies this imposition of intention by *law*, not by finding any meeting of minds of the parties or from any conduct, act or sign, indicating a tacit understanding, but by way of an erroneous determination that legally such inference was absolutely required and that the Respondents' intent and desire (not the Petitioners') would con-

firm and determine the meaning of the assent expressed by the Petitioners.

Since the trial judge specifically stated that he had not considered "exactly" what the total understanding reached on May 23 was (189 F. Supp. 314 at 317), the Court of Appeals could not for itself determine factually what that understanding was. If the District Judge erred in disregarding the terms of the proffered release (as the majority found), and the Court of Appeals felt that it was essential for him to find the binding agreement existing *before* the dispute as to the terms of the release, the Court of Appeals could not supply this defect and make its own findings. If faced with the necessity of determining whether the objectionable terms of the proffered release were intended to be included, prior to the dispute arising as to the terms of the release, the District Judge might well conclude *as a matter of fact* that they were not intended or contemplated by the parties and hence the insistence upon them was, as Judge McLaughlin points out in his dissent, a new settlement offer cancelling out all prior understandings.

The Court of Appeals could not make this factual determination in the first instance. The situation is analogous to the familiar appellate procedure that where the correctness of a lower court's decision depends upon a determination of fact which only a fact finder can make, but which has not been made, the appellate court cannot take the place of the fact finder. *Securities and Exchange Commission v. Chenery Corp.*, 318 U. S. 80 (1943).

An agreement in accord and satisfaction or in compromise and settlement is not readily to be presumed from the mere proof of agreement on a single issue of fact where more than one issue is involved: See *Atlantic Co. v. Broughton*, 146 F. 2d 480 (5th Cir. 1944).

No rule of law requires the conclusion made by the majority in this case. Indeed the law is to the contrary.

If an alleged agreement is express, no implied contract will be inferred: *Perkins v. Hart*, 11 Wheat. (24 U. S.) 237 (1826). Nor will a court find a contract by implication under circumstances which the parties did not have in contemplation: *Carpenter v. U. S.*, 17 Wall. (84 U. S.) 489 (1873). An implied promise can only be proved or found from a showing of circumstances which indicate an intention to assume an obligation: *Webster v. Upton*, 1 Otto (91 U. S.) 65 (1875). Indeed, an agreement will not be implied in fact, unless there is a meeting of the minds of the parties, indicated by some intelligible conduct, act or sign: *Baltimore & Ohio R. Co. v. U. S.*, 261 U. S. 593 (1923); nor where the circumstances are such as clearly rebut the existence of an implied contract: *Klebe v. U. S.*, 263 U. S. 188, 191 (1923); *Ball Engineering Co. v. J. G. White & Co.*, 250 U. S. 46, 57 (1919).

The decisions in the Third Circuit on the issue of law involved are contrary to the instant decision.

Thus, in *Reich v. Vegex, Inc.*, 51 F. Supp. 99 (E. D. Pa. 1942), affirmed per curiam, 137 F. 2d 647, it was held that preliminary negotiations leading up to the formation of a contract must be distinguished from the contract itself, and proof of the contract must be certain and explicit at least on all essentials. More importantly, the court held that the law will not presume or imply a contract except in cases where it is necessary to do so in order to prevent an undue hardship or injury upon one of the parties. Quoting from a leading Pennsylvania case the Court said (p. 104):

> "It is not unusual for persons to agree to negotiate with the view of entering into contractual relations and to reach an accord at once as to certain major items of the proposed contract and later find that on other details they cannot agree. In such a case no contract results. Upsal Street Realty Co. v. Rubin, 326 Pa. 327, 192 A. 481, 483."

(See also: *Williston on Contracts* (Rev. Ed), Vol. 1, Sec. 27; and Section 25 of *Restatement, Law of Contracts.*)

In *American La France F. E. Co. v. Borough of Shenandoah*, 115 F. 2d 866 (1940), the Third Circuit adopted the language of the Supreme Court of Pennsylvania heretofore quoted from *Cameron v. Eynon* (supra) and the language from *Comment (a) to the Restatement of Contracts*, Sec. 5, that:

> "Implied contracts must be distinguished from quasi contracts, which also have often been called implied contracts or contracts implied in law. Quasi contracts, unlike true contracts, are not based on the apparent intention of the parties to undertake the performance in question, nor are they promises. They are obligations created by law *for reasons of justice*." (Emphasis supplied.)

Where, as in the instant case, reasons of justice compel a contrary result, and there has been no unjust enrichment, no appropriation of benefits, no wrongful conduct, and no breach of legal duty, of or by Petitioners, there is no basis for the imposition of a fictional contract where none exists in fact, express or implied.

While an offer may be accepted by conduct, there must be *evidence* that the offer was accepted in such fashion. *Cohen v. Johnson*, 91 F. Supp. 231 (M. D. Pa. 1950).

So also, the decision of the Court of Appeals in the instant case is in direct conflict with the decisions in the other Circuits.

Thus, in *Kraft Foods Co. v. Commodity Credit Corp.*, 266 F. 2d 254 (7th Cir. 1959), the court refused to impose a quasi contract where there was no finding that the parties acted in bad faith suggesting that a quasi contract rests

not upon a finding as to what a reasonable man would have intended by his acts or conduct, but rather on the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another, and that whatever it is certain a man ought to do, that the law supposes him to have promised to do citing 17 C. J. S. Contracts, Sec. 6, p. 324.

In the instant case, no equitable principle or consideration warrants the assumption that Petitioners ought to give up their equitable demands relating to the future because they would be paid for money damages already sustained in the past.

Thus, in the Sixth Circuit the courts have held that in establishing a contract by inference the facts and circumstances must be sufficient to clearly and convincingly manifest mutual assent of minds to enter into the contract sought to be implied or established. *Illinois Cent. R. Co. v. R. F. C.*, 68 F. Supp. 78 (W. D. Ky. 1946), affirmed 177 F. 2d 201 (6th Cir. 1947). In the same Circuit, in *Rubsam v. Harley C. Loney Co.*, 117 F. Supp. 164 (E. D. Mich. 1953), affirmed 217 F. 2d 353 (6th. Cir. 1954), cert. den. 350 U. S. 834, where, as in the instant case, the background of negotiations was rampant with uncertainty and indecision, and doubt and difference prevailed in the minds of the parties, the Court found that it could not and would not imply a contractual relation between the parties.

In the Second Circuit, it has likewise been held that contracts implied in law or quasi contracts are not based on the apparent intention of the parties but are only predicated on an element of fault, or undue advantage taken by one party of another and to promote justice where it would not otherwise be served: *F. E. Grauwiller Transp. Co. v. King*, 131 F. Supp. 630 (E. D. N. Y. 1955), affirmed 229 F. 2d 153; *Gallant v. Waterman S. S. Corp.*, 90 F. Supp. 495.

To the same effect are cases in the Fifth Circuit: *Don*

George, Inc. v. Paramount Pictures; 111 F. Supp. 458; *Le Mieux Bros., Inc. v. Tremont Lumber Co., Ltd.*, 52 F. Supp. 116 (W. D. La. 1943), affirmed 140 F. 2d 337 (1944).

In the Eighth Circuit, it has been held that the doctrine of quasi contract is based solely on a legal fiction and rests on the equitable principle that one should not be allowed to enrich himself at the expense of another: *Huntley v. Gunn Furniture Co.*, 79 F. Supp. 110, 114 (W. D. Mich. 1948).

Contrary to the clear distinction between quasi contracts and contracts implied in fact made in the cases and authorities, the majority of the Court of Appeals in the instant case has imposed a quasi contract upon petitioners in the absence of any of the elements essential to such a dire consequence.

If the agreement made is to be regarded *as a matter of law* to cover "both aspects of the suit" and settlement of both aspects of the suit is regarded as a unit, then if, as in the instant case, the understanding as to one particular aspect is left uncertain, the entire agreement will be and should be regarded as only inchoate because the parties have not been *ad idem* and therefore neither is bound: *First National Bank v. Hall*, 11 Otto (101 U. S.) 43 (1880).

Where, as in the instant case, the minds of the parties, as shown by the evidence, *moved on parallel but not concentric lines*, there was no meeting of minds and no mutuality of consent to the same thing, which are both necessary to create a contract, whether by implication or otherwise. It is not pretended that prior to the submission of the release in question, the Respondents ever submitted any offer to settle the equitable demands clearly set forth in the Complaint—and as we shall hereafter point out—extremely essential as an adjunct to the enforcement of the anti-trust laws.

If there was a misunderstanding as to the terms of the agreement, then neither party is bound in law or equity. It is essential to the validity of a contract that the parties should have consented to the same subject matter in the same sense. They must have contracted *ad idem*: *Utley v. Donaldson*, 4 Otto (94 U. S.) 29 (1877).

In any event, the District Judge deliberately neglected to determine as a fact whether the release submitted was an appropriate release as contemplated by the oral "settlement agreement" merely because Respondents were thereafter willing to omit the objectionable language. Because of this concession by the defendants, the District Court viewed the controversy over the terms of the release, as immaterial to the decision of the case. The majority of the Court of Appeals stated emphatically (298 F. 2d 801 at 803):

> *"We do not agree with this position because, if the parties had not entered into a binding agreement before the dispute over the terms of the release led the plaintiffs to reject the settlement, no further modification of the defendants' position could impose any obligation on the plaintiffs. Therefore it must be decided whether there was an expression of mutual assent sufficient to create a binding settlement agreement before the controversy arose about the inclusion of a particular provision in a formal release."* (Emphasis supplied.)

Instead of sending the case back so that the District Court Judge could make such a finding, the majority of the Court of Appeals proceeded to make the *factual finding* which it deemed essential itself, *a privilege which it does not have.* It is not the function of an appellate court to search the record and analyze the evidence in order to supply essential findings which the District Court failed to make:

Kelley v. Everglades Drainage Dist., 319 U. S. 415 (1943). In the latter case, in a per curiam opinion, this Court said:

> "We hold . . . that there must be findings, stated either in the court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusion."

In the instant case, as the majority of the Court of Appeals found, such an essential finding was lacking and had not been made by the District Court Judge. In erroneously attempting to find the fact needed out of the evidence, the Court of Appeals found no direct or circumstantial evidence to support the essential fact. It then proceeded to declare *as a matter of law* that the mere expression of willingness to accept $10,000. for its pecuniary damages was tantamount to an understanding that "both aspects of the suit" were covered by the "settlement".

It is respectfully submitted that the majority of the Court of Appeals erred in attempting to make a finding of fact on a point in controversy and in imposing by an erroneous rule of law a contract implied in law. It could legally do neither. The dissenting judge on the other hand properly concluded that under the facts disclosed and found the release which under the testimony represented Respondents' idea of the contemplated settlement, "was never acquiesced in by plaintiffs" and "[t]here was therefore no meeting of minds between the parties" and hence "no final settlement agreement". Thus, he found that after Petitioners had rejected the defense proposal as set out in the release, it was too late for Respondents to "waive" the objectionable language, as at that stage the Respondents were in fact submitting a new offer which Petitioners could properly decline.

Point II. The Respondents, having demanded a jury trial, were entitled to have all issues of fact, including factual issues relating to the defense of settlement determined by a jury, and such right was not waived by the Petitioners in submitting themselves to hearings pursuant to a motion to dismiss alleging an agreement of settlement. The District Court erred in making findings of fact, pursuant to such hearings, despite conflict in the testimony thereon.

The majority of the Court of Appeals has decided that Petitioners may not now assert an invasion of their right to trial by jury of the factual issues involved. It asserts that as Petitioners acquiesced in the disposition of the matter by the trial judge they have waived their right to jury trial of the issues.

The Seventh Amendment provides that: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ."

Neither the Congress nor the courts can deprive a litigant of this right. It follows that if Petitioners requested a jury trial, *as the docket entries clearly indicated they did in the instant case*, they need not *reassert* this demand as each issue properly triable by the jury comes up for consideration.

A defense of release or settlement is an affirmative defense. Where, as in the instant case, it is alleged that such release or settlement occurred after the litigation was begun, Rule 15(d) of the F. R. C. P. permits Respondents to move to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. This procedure is appropriate to the assertion of

a release allegedly made after the filing of the Complaint and Answer: *Kraushaar v. Leschin*, 4 F. R. D. 144 (E. D. Pa., 1944).

The procedure in the instant case of proceeding to determine the issue of settlement by Petition for Dismissal was not objected to because the method was suggested by the district court judge (39a, 49a) as a means of getting on the record the willingness of Respondents to pay the sum allegedly agreed upon in settlement of the "package deal" *which would permit the other plaintiffs to receive their money in the undisputed cases of settlement* (38a, 39a) and because it was believed that the Court was interested in preserving its own dignity relating to prior statements made by counsel to it respecting settlement of the cases involved in the negotiations (38a). It was not to be anticipated that the district court judge, acting without a jury, would make factual findings relative to disputed matters of fact. Resolution of such disputed issues of fact would not be permissible under a motion pursuant to Rule 56: *Wittlin v. Giacalone*, 154 F. 2d 20 (Dist. of Columbia Cir., 1946), or such a motion to dismiss: *Sogmose Realties, Inc. v. Twentieth Century-Fox Film Corp.* (S. D. N. Y., 1954), 1954 C. C. H. Trade Cases ¶67,688. A summary judgment is a judgment in bar that results from the application of substantive law to facts that are established beyond reasonable controversy. Where the motion presented to the court together with the materials submitted therewith establish that there is a genuine issue as to a material fact, the motion should be denied: *Toebelman v. Missouri-Kansas Pipe Line Co.*, 130 F. 2d 1016 (3rd Cir. 1942); *Bozant v. Bank of New York*, 156 F. 2d 787, 790 (2nd Cir. 1946); *Colby v. Kline*, 178 F. 2d 872, 873, 874 (2nd Cir. 1949).

Judge Van Dusen clearly made findings on disputed facts. This he had no right to do. The proper procedure upon recognizing the disputed facts was to require Respondents

to assert the defense of settlement or release in proper form pursuant to Rule 15(d) so that the disputed facts could be submitted to a jury pursuant to appellants' prior demand for jury trial as to all issues. This right was not waived at any time. A demand for jury trial having been made in the cases, there was no waiver under Rule 38(d). While it is no invasion of the right guaranteed by the Seventh Amendment to resolve issues concerning which there is no factual dispute by new methods of procedure, it is essential that where the ultimate determination of issues of fact is involved, the right to trial by jury should not be interfered with or obstructed. *Ex Parte Peterson*, 253 U. S. 300 (1920); *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines*, 7 L. Ed. (2) 798. The denial of a jury trial where demanded and appropriate because of the involvement of factual issues is subject to most exacting scrutiny on appeal: *City of Morgantown v. Royal Insurance Co. Ltd.*, 337 U. S. 254 (1949). Having recognized that the determination of the Petition involved decisions on disputed facts, the action of the district judge in resolving such facts and granting dismissal on terms was extrajurisdictional: *Raytheon Mfg. Co. v. Radio Corp. of America*, 76 F. 2d 943 (1st Cir. 1935), affirmed 296 U. S. 459 (1935), and in violation of Petitioners' constitutional rights.

Point III. The Court of Appeals erred in holding that the Respondents' condition that settlement of Petitioners' cases was conditioned upon settlement of eight other cases in a "package deal" to settle all ten cases was assented to by Petitioners and foreclosed Petitioners' contention that they were not bound to settle both aspects of their suits, since such condition was not known to Petitioners, was not accepted by them, and was in violation of public policy.

The Respondents suggest that they made settlement of the Petitioners' cases contingent on the settlement of eight other cases. This fact was unknown to Petitioners although known to its counsel. The majority of the court considered it necessary to determine whether a bargain thus conditioned prevented a contract from arising so long as the condition remained unfulfilled. *By erroneously assuming that the condition of settling the remaining eight cases bound the Petitioners,* the majority of the court concludes that it "was not in any sense illusory and in its conditional form *was acceptable to appellants.*" (Emphasis supplied.) As a matter of fact, the promise to settle the remaining eight cases was completely unknown to Petitioners, did not affect their agreement and was not accepted by them. The settlement of these eight cases was of no concern to Petitioners. Petitioners could not enforce the promise to settle the remaining eight cases. The benefit of such promise ran only to the plaintiffs and defendants therein *and to their counsel.* The deliberate joinder of the agreement to settle Petitioners' cases with eight other cases was a violation of its agreement to accept a compromise of its money damages without any other conditions attached, and indeed in violation of public policy.

In short, there was no bilateral contract on this point as

the majority suggests. The act or forbearance related to the settlement of the remaining eight cases was not sufficient consideration for a unilateral contract on the part of Petitioners to settle their damage claim. It was not the *quid pro-quo* for Petitioners' promise and formed no part of the consideration for Petitioners' promise to settle its money damages. Indeed, the district court judge so held, saying: "However, neither plaintiffs nor their counsel ever made settlement of these two cases . . . contingent on the settlement of the other eight cases" (105a).* If this finding be given any effect, the conclusion of the majority that: "We are satisfied that the parties entered into a valid contract to settle, upon condition that the other suits also be settled" is clearly erroneous, unjustified, and contrary to the finding of the District Court. In so far as the court relies upon this condition to prevent repudiation of the involved agreement during the period required to accomplish settlement of the other suits, such reliance is wholly unwarranted.

The employment of the "package deal" method was hardly conducive to full disclosure of all terms of the offer to each individual plaintiff.

The attempt to negotiate a settlement on behalf of many clients where the settlement of any one case is dependent upon the settlement of all the cases is alien to the moral principle founded in the Biblical admonition that no man may serve two masters. *Matt. 6:24.*

In the recent case of *United States v. Mississippi Valley*

---

* Strangely, this very finding was contradictory to the District Judge's own earlier recollection of the facts (38a).

The finding was consistent however with a letter from then Chief Judge Ganey which the District Court read to counsel protesting against "package" settlements. (See 63(a), 64(a) because it "was perhaps trading the right of one client for the right of another . . ."

The District Judge agreed "it is a ticklish type situation" which might result in the argument that even if made such agreement "should not be enforceable"

Generating Co., 5 L. Ed. 2d 268 (1961), involving the Federal Conflict of Interest Statute, the Chief Justice speaking for the majority of this Court after referring to the above maxim and declaring it ". . . especially pertinent if one of the masters happens to be economic self-interest", said:

> "The statute is thus directed not only at dishonor, but also at conduct that tempts dishonor. This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they transact on behalf of the Government. To this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened."

The impact upon a common attorney for all plaintiffs in ten cases being pressured by defendants to settle all cases at the risk of securing no settlement at all cannot be underestimated. When coupled with a promise by defendants of additional money in the form of counsel fees, and consideration of the fact that the problem of allocating the total compensation among unrelated clients is reposed in the attorney, the difficulty in prosecuting each case on its individual merits to assure each client maximum allegiance, is apparent. In the case at bar, the Petitioners' expressed dissatisfaction with proposed settlement conditions was not given prompt attention for the reason (assigned by the attorney) that a monetary problem concerning one of counsel's other clients was considered a greater obstacle to effectuating the package deal (81a, 82a).

While respondents consistently argue that only $10,000. was involved in the 309 and Main Line offer, a calculation

of the total sum of $135,000. referred to on page 44a, allocates $15,000. not $10,000. to the 309 and Main Line Drive-Ins and strongly indicates that this figure of $15,000. was not inadvertent. That the availability of $15,000. was present is further evidenced by statement of Respondents' counsel (39a) that there was a larger offer available to these Petitioners. Examination of the record compels the conclusion that, even assuming the highest good faith, the pressure exerted by defendants to settle all cases at the risk of settling none cannot be underestimated. The difficulty, under those circumstances, of assuring each plaintiff maximum and undivided allegiance, is present. Would Respondents, assuming negotiations of Petitioners' cases only, have paid more than $10,000. in settlement of the money damages? If a lump sum or package settlement presents basic difficulties, can the difficulties be overcome by the admonition to counsel to deal with each case individually and not to sacrifice any individual's rights? The difficulties are many. When it comes to allocation, which plaintiff will benefit, the one who has the best case or the one who will obstruct the deal unless he receives more than his fair share? One plaintiff may be delayed (as in this case) or prevented from settling because his settlement is dependent on other persons who have nothing in common with him save that they are all plaintiffs represented by the same counsel in actions against the same defendants. Is not a lump sum or package settlement inconsistent with the requirement that full disclosure be made to a party in any settlement negotiation? The Supreme Court has pointed out that impairment of impartial judgment can occur in even the most well meaning men when their personal economic interests are affected and that what might have happened in a given situation is of greater concern than what actually happened.

It is inevitable that rights of some of the parties to a

"package deal", almost of necessity, are sacrificed. The contention, therefore, that a "settlement" was arrived at by this process, where the facts are disputed, should not be sustained and the entire process should be declared contrary to public policy.

Point IV. The issues involved herein are of paramount importance to the continued enforcement of the anti-trust laws and the preservation of the benefit derived in such enforcement by actions brought by private litigants seeking not only damages for injuries sustained, but elimination of future violations of the anti-trust laws. Under the facts, an agreement to settle the equitable demands of Petitioners should not be inferred except for clear and compelling reasons.

The issues involved and the questions here presented are of paramount importance in the enforcement of the anti-trust laws.

The civil anti-trust action brought by a private litigant as authorized by the anti-trust laws[1] envisions a cooperative effort on the part of government and private litigants to prevent continued violation of the anti-trust laws.

The focal point of anti-trust regulation is the *Sherman Act* (15 U. S. C. A., Sections 1 to 7). It was essentially and

---

[1] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained and the cost of suit, including a reasonable attorney's fee." 38 Stat. 731 (1914), 15 U. S. C. Sec. 15 (1946).

Section 16 of the Clayton Act (15 U. S. C. A., Section 26) expressly authorizes private suits for injunctive relief against threatened loss or damage by violation of the anti-trust laws.

primarily a criminal statute. It was found necessary in 1914 to implement the Sherman Act by passage of the *Clayton Act* (15 U. S. C. A., Sections 12 to 27) and *The Federal Trade Commission Act* (15 U. S. C. A., Sections 40 to 57). These statutes supplement the Sherman Act and provide several distinct avenues to the enforcement of fair competitive practices.

The general theme of the Clayton Act is anticipatory to prevent the initial conduct in its early stages which might lead to a restraint of trade or a monopoly. The Act primarily has a basis in equity, whereas the Sherman Act is predominantly a criminal statute and deals with consummated restraints. The Federal Trade Commission Act likewise regulates businessmen through the courts, as well as through the prosecuting and judicial procedure of the Federal Trade Commission. The function of the Federal Trade Commission is to investigate, recommend and report; and in so doing it aids the Department of Justice and the Federal District Courts in enforcing the anti-trust laws.

Generally, Sections 1 through 7 of the Sherman Act provide for a criminal proceeding, an equity proceeding, and a suit by a damaged individual. These were intended to afford concurrent remedies and a judgment in one action would not be a bar to obtaining a judgment in another. In recent years, the policy of the Attorney General has been to limit criminal prosecutions to "classic hardcore anti-trust violations": (*Barnes, Theory and Practice of Antitrust Administration* (Jan. 1954), CCH *Antitrust Law Symposium* 1954 "*How to Comply with the Antitrust Laws*," p. 40.)

The Attorney General is also empowered by Section 4 of the Sherman Act and Section 15 of the Clayton Act "to institute proceedings in equity to prevent and restrain . . . violations [of the anti-trust laws]. Such proceedings may be by way of petition . . . praying that such violation shall be enjoined or otherwise prohibited." (26 Stat. 209 (1890),

15 U. S. C. Sec. 4; 38 Stat. 736 (1914), 15 U. S. C. Sec. 25). These proceedings are independent of any criminal actions which may be instituted for the same violations. *U. S. v. National Association of Real Estate Boards*, 339 U. S. 485 (1950). It is not uncommon to see the Anti-trust Division proceed from both directions against the same defendant. And, as heretofore suggested under Section 16 of the Clayton Act (15 U. S. C. Sec. 26) a private party is authorized to bring suit for equitable relief under the Anti-trust Laws, although such relief differs from the equitable relief to which the United States is entitled. The latter right of the private litigant is separate and independent of his right to monetary damages.

In suits in which the Department of Justice is successful in proving a violation of the anti-trust laws, a final decree may take one or more of the following forms: (1) a prohibitory injunction, (2) a regulatory injunction, or (3) an order dissolving a combination or requiring it to divest itself of part of its property.

Indeed, it may be that the final decree in a conspiracy case may prohibit acts which are perfectly legal under ordinary circumstances, on the ground that they are part of an illegal scheme. Such provisions are customarily sustained on the ground that they are necessary in order to dissipate the effects of the conspiracy. See e. g. *U. S. v. United States Gypsum Company*, 340 U. S. 76 (1947); *U. S. v. Univis Lens Co.*, 316 U. S. 241, 254 (1942); *Ethyl Gasoline Corporation v. U. S.*, 309 U. S. 436, 461 (1940).

An example of decretal provisions in conspiracy cases precluding individual conduct on the part of the defendants which would otherwise be legal, are found in the final decision of one of the major movie cases, particularly as it deals with the subject of clearances. (The term "clearance" means the period of time stipulated in license con-

tracts which must elapse between runs of the same feature within a particular area or in specified theatres.)

The decree provides, inter alia: (*United States v. Loew's, Inc., et al.*, CCH, Trade Cases 1950-1951, ¶62,573 (S. D. N. Y. 1950):

> "Each of the defendant distributors . . . is hereby enjoined:
>
> • • •
>
> "4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked and not legal under the provision of this decree, the burden shall be upon the distributor to sustain the legality thereof.
>
> • • •
>
> "8. From licensing any feature for exhibition upon any run in any theatre in any other manner than that each license shall be offered and taken theatre by theatre, solely upon the merits and without discrimination in favor of affiliated theatres, circuit theatres or others."

The most interesting feature of these provisions is that which shifts the burden of proof from the complaining party to the defendants where a clearance is challenged as unreasonable. This provision was upheld in *United States v. Paramount Pictures, Inc.*, 334 U. S. 131, 148 (1948).

We have thus far dealt specifically with the right of the United States to equitable relief. The conditions under which a court will grant injunctions to a private party

differ somewhat from those under which the Government may obtain such relief, and in addition the complainant must, in the words of the statute, prove "threatened loss or damage by a violation of the anti-trust laws," a requirement which the court in *Bedford Cut Stone Co. v. Journeyment Stone Cutters' Association*, 274 U. S. 37, 54 (1927), described as showing a "dangerous probability" of harm. To avoid such threat of future harm the court granted divestiture in the case of *U. S. v. Crescent Amusement Co.*, 323 U. S. 173 (1944), and dissolution in the case of *Schine Chain Theatres, Inc. v. U. S.*, 334 U. S. 110 (1948).

A breakdown at any point in the chain of enforcement provisions heretofore referred to results in a leak which may well inundate the basic structure. So important is the link of the rights granted to the private litigant that such rights have been granted unusual supports. Thus the anti-trust laws under proper circumstances allow treble damages to the private litigant and costs of suit and recovery of reasonable attorney's fees. *And even where such private litigant is unable to prove that he has been pecuniarily damaged by defendants' violations of the anti-trust laws and cannot recover an attorney's fee he may nevertheless be entitled to injunctive relief as to future injury: Alden-Rochelle Inc. v. American Society of C. A. & P.*, 80 F. Supp. 888, 898 (S. D. N. Y. 1948).

Moreover, in further aid of the private litigant's development of his link of enforcement of the anti-trust laws, Section 5 of the Clayton Act (15 U. S. C. A. Sec. 16) permits a treble damage plaintiff to introduce a prior Government decree or judgment against the same defendants as *prima facie* evidence of all issues determined in the prior adjudication. (*Emich Motors Corp. v. General Motors Corp.*, 340 U. S. 558, 569 (1951); See also *McDonald, "Proof of Conspiracy: The Prima Facie Rule,"* CCH. Anti-trust Law Symposium, 1952, pp. 59-77).

Thus, whether the government or a private litigant seeks equitable relief the court should and will consider whether there is a "threat of future violation or a contemporary violation of a nature likely to continue or recur."[11]

Thus, it has been held that in such cases "[the] necessary determination is that there exists some cognizable danger of recurrent violation": *U. S. v. W. T. Grant Co.*, 345 U. S. 629, 633 (1953). See likewise *U. S. v. Borden Co.*, 347 U. S. 514, 519-520 (1954).

Indeed, in the instant case, the respondents' "proclivity in the past to use" their power and affiliation "for an unlawful end warrants effective assurance that no such opportunity will be available in the future" and does illuminate or explain the present and predict the shape of things to come: *U. S. v. Crescent Amusement Co.*, 323 U. S. 173, 189 (1944).

The end sought by the anti-trust laws is the prevention of restraints to free competition in business and commercial transactions which tend to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which

---

[11] **United States v. Oregon State Medical Society**, 343 U. S. 326, 333 (1952), in which Mr. Justice Jackson, speaking for the court, used the following language:

"It will simplify consideration of such cases as this to keep in sight the target at which relief is aimed. **The sole function of an action for injunction is to forestall future violations.** It is so unrelated to punishment or reparation for those past that its pendency or decision does not prevent concurrent or later remedy for past violations by indictment **or action for damage by those injured.** All it takes to make the cause of action for relief by injunction is a real threat of future violation of a nature likely to continue or recur. This established, it adds nothing that the calendar of years gone by might have been filled with transgressions. Even where relief is mandatory in form, it is to undo existing conditions, because otherwise they are likely to continue. In a forward-looking action, such as this, an examination of a 'great amount of archeology' is justified only when it illuminates or explains the present and predicts the shape of things to come."

have come to be regarded as a special form of public injury: *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 493 (1940). In short, it is the public interest which is protected by the acts.

The anti-trust laws provided both public and *private* remedies for the injuries flowing from such restraints: *U. S. v. Addyston Pipe & Steel Co.*, 175 U. S. 211 (1899); *Standard Oil Co. of New Jersey v. U. S.*, 221 U. S. 1 (1910); *Apex Hosiery Co. v. Leader* (supra), and were intended to supply an ancillary force of private investigators to supplement the Department of Justice in law enforcement: *Quemos Theatre Co. v. Warner Bros. Pictures*, 35 F. Supp. 949 (D. N. J., 1940); *P. W. Husserl Inc. v. Simplicity Pattern Co.*, 191 F. Supp. 55, 60 (S. D. N. Y., 1961); *Radovich v. National Football League*, 352 U. S. 445, 454 (1957).

Opposing the public policy of encouraging private litigation under the anti-trust laws is a denial of the right to a disposition of a private litigant's case on the merits.

To affirm the summary dismissal here, the majority finds that not only were petitioners charged, on a reasonable man theory, with contemplating and therefore held to have agreed to release respondents from claims for money *and injunctive relief* but, in addition, to stultify themselves by declaring that the licensing practices condemned by them as unlawful restraints and vicious were not restraining or vicious at all but were, in fact, reasonable.

It is submitted that imposing by inference that kind of intention on a private litigant in an anti-trust suit is unrealistic and a stretch inconsistent with the public policy of the anti-trust laws.

It is submitted that in a case in which violation of the anti-trust laws is alleged in good faith, the courts should be hesitant to find that the parties released or settled as to activities specifically declared to be violative of the law or their rights specially afforded by such laws, as ancillary to government enforcement of such laws, unless the manifes-

tation of assent to such settlement is clear and beyond dispute. Since the anti-trust laws seek the elimination of continuing abuses as well as imposing punitive damages, the question of whether the understanding of the parties relating solely as to the amount of damages to be paid, was intended to be a compromise or settlement of the petitioners' claim for equitable relief comformable to the requirements of the anti-trust laws, was an issue of fact. The district court judge made no finding on *this* fact and expressly declared that "it is not necessary to decide *exactly* what the total understanding reached on May 23 was" (105a).

The power of the Court of Appeals is restricted to the determination of questions of law arising on the record: *Dowell, Inc. v. Jowers*, 182 F. 2d 576 (5th Cir. 1951). It cannot try the matter de novo: *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F. 2d 846 (8th Cir. 1952).

An agreement in accord and satisfaction or in compromise and settlement is not readily to be presumed from the mere proof of agreement on a single issue of fact where more than one issue is involved: See *Atlantic Co. v. Broughton*, 146 F. 2d 480 (5th Cir. 1944).

No rule of law requires the conclusion made by the majority in this case. Indeed the law is to the contrary. It is settled that parties may settle any part of a controversy and leave the rest to litigation. So a compromise and settlement of issues in litigation need not embrace all the matters in issue; adjustment of single issues, although not necessarily determinative of the outcome are encouraged: *Wolverine Ins. Co. v. Klomparens*, 273 Mich. 493; *Milwaukee Mechanics Ins. Co. v. Ciaccio*, 38 F. 2d 153 (7th Cir. 1930); 15 *Corpus Juris-Secundum*, 714, 715, Sec. 3(a). This rule is especially applicable if the rights given to private litigants under the anti-trust laws are to continue to be a link in the chain of enforcement.

Under the circumstances, the judgment of the Court of Appeals should be reversed.

CONCLUSION.

The issues involved herein, therefore, are of vital importance to the continued enforcement of the Anti-Trust laws, pursuant to the pattern of enforcement intended by the Congress of the United States. The decision of the Court of Appeals is a major departure from the law and rules governing the power of appellate courts, and if allowed to stand will result in a substantial weakening of the enforcement provisions of the Anti-Trust laws and conflict and disharmony in the uniform application of the Anti-Trust laws in the various circuits.

Insofar as the District Court undertook to make findings of fact on a motion to dismiss where the testimony was in conflict and the Court of Appeals made a finding of fact, not inferable from the testimony and not found by the District Court judge, this decision is a sharp erosion of the constitutional mandate that, "in suits at common law, where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, and according to the rules of the common law." Unless this decision is reversed, further erosion of that mandate will surely follow.

Respectfully submitted,

HARRY NORMAN BALL,
SYDNEY C. ORLOFSKY,
Counsel for Petitioners.

APPENDIX TO PETITION.

JUDGMENTS OF THE U. S. DISTRICT COURT.

MAIN LINE THEATRES, INC.
vs.
PARAMOUNT FILM DISTRIBUTING CORPORATION, et al.

ORDER FOR DISMISSAL.

It is hereby ORDERED, ADJUDGED and DECREED that the foregoing case shall be dismissed with prejudice.

FRANCIS L. VAN DUSEN,
Judge.

---

309 DRIVE-IN CORP.
vs.
PARAMOUNT FILM DISTRIBUTING CORPORATION, et al.

ORDER FOR DISMISSAL.

It is hereby ORDERED, ADJUDGED and DECREED that the foregoing case shall be dismissed with prejudice.

FRANCIS L. VAN DUSEN,
Judge.

ORDERS OF THE U. S. DISTRICT COURT.

ORDER FOR DEPOSIT OF FUNDS IN REGISTRY OF COURT.

(Filed Nov. 14, 1960.)

AND NOW, November 14, 1960, in accordance with the Memorandum Opinion of November 10, 1960, IT IS ORDERED that the defendants pay the sum of Five thousand ($5,000) Dollars into the registry of the court within ten (10) days.

/s/ FRANCIS L. VAN DUSEN,
J.

This sum will be paid out to plaintiff upon its execution of a release in favor of defendants in the form described in the Memorandum Opinion of November 10, 1960 (Document No. 24 in Civil Action No. 24983). Upon payment of the above sum into the registry of the court and submission to the court of proof of tender of such a release to plaintiff by defendants, defendants may submit an order for the dismissal of the above case with prejudice.

ORDER FOR DEPOSIT OF FUNDS IN REGISTRY OF COURT.

(Filed Nov. 14, 1960.)

AND NOW, November 14, 1960, in accordance with the Memorandum Opinion of November 10, 1960, IT IS ORDERED that the defendants pay the sum of Five thousand ($5,000) Dollars into the registry of the court within ten (10) days.

/s FRANCIS L. VAN DUSEN,
J.

This sum will be paid out to plaintiff upon its execution of a release in favor of defendants in the form described in the Memorandum Opinion of November 10, 1960 (Document No. 24). Upon payment of the above sum into the registry of the court and submission to the court of proof of tender of such a release to plaintiff by defendants, defendants may submit an order for the dismissal of the above case, with prejudice.

ORDER FOR DISMISSAL.

It is hereby ORDERED, ADJUDGED and DECREED that the foregoing case shall be dismissed with prejudice.

FRANCIS L. VAN DUSEN,
Judge.

ORDER FOR DISMISSAL.

It is hereby ORDERED, ADJUDGED and DECREED that the foregoing case shall be dismissed with prejudice.

FRANCIS L. VAN DUSEN,
Judge.

OPINION OF U. S. C. A. 3.

UNITED STATES COURT OF APPEALS.

FOR THE THIRD CIRCUIT.

No. 13,508.

MAIN LINE THEATRES, INC.,
Appellant,

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, WARNER BROS. PICTURES DISTRIBUTING CORP., RKO RADIO PICTURES, UNIVERSAL FILM EXCHANGES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, COLUMBIA PICTURES CORPORATION, LOEW'S INCORPORATED, UNITED ARTISTS CORPORATION, and ALLIED ARTISTS DISTRIBUTING CORP.

No. 13,509.

309 DRIVE-IN CORP.,

Appellant

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, WARNER BROS. PICTURES DISTRIBUTING CORP., UNIVERSAL FILM EXCHANGES INC., TWENTIETH CENTURY-FOX FILM CORPORATION, COLUMBIA PICTURES CORPORATION, LOEW'S INCORPORATED, UNITED ARTISTS CORPORATION, BUENA VISTA FILM DISTRIBUTING CORP., ALLIED ARTISTS DISTRIBUTING CORP.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Argued September 18, 1961.

Before: GOODRICH, McLAUGHLIN and HASTIE, *Circuit Judges*.

OPINION OF THE COURT.

(Filed January 16, 1962.)

By HASTIE, *Circuit Judge*.

In these civil antitrust suits under Sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1, 2, the appellants, two

corporations controlled by Stanley Warner, have complained of certain practices of the defendants in the commercial distribution of motion pictures and have asked for treble damages and injunctive relief. In the court below the cases were decided on the defendants' pretrial motions, asserting that the parties had entered into a binding settlement agreement and asking the court to dispose the complaints with prejudice. After a hearing, at which testimony was introduced, the district court concluded that "these cases were settled by [oral] agreement of the parties in May 1960, providing for payment of $10,000 by defendants and the giving of releases by plaintiffs." The court directed the defendants to pay $10,000 into the registry of the court and the plaintiffs to tender releases. Thereafter the court entered the orders of dismissal with prejudice from which these appeals have been taken.

Most of the significant facts are stated or necessarily implied in the memorandum opinion of the court below. Others not given and not disputed in the record. These two suits and eleven others like them were instituted at about the same time in the District Court for the Eastern District of Pennsylvania by several motion picture exhibitors, all of whom expressed similar complaints against the same defendants. Ten cases involved Pennsylvania theaters and three involved New Jersey theaters. One of the Pennsylvania cases, *Colonial Amusement Co. v. Columbia Pictures*, Civil Action No. 19,238, was the first of the group listed for trial. At this stage, pretrial conferences were featured by extensive negotiations for settlement of all ten cases involving Pennsylvania theaters. Negotiations were facilitated by the fact that counsel for the plaintiffs in the *Colonial Amusement* case was also counsel for the plaintiffs in the companion cases.

In these negotiations counsel, acting within their authority, expressed the willingness of the parties to settle

these suits for a total sum of $[illegible]. Defense counsel then prepared and submitted to appellants' counsel a form of release to be executed by appellants.

Appellants refused to sign the release because the release contained, in addition to the usual language releasing all claims up to the time of the release, a provision that the plaintiff exhibitor "agrees that its present availability and the present procedure pursuant to which it licenses motion pictures is reasonable." The parties construed this language as a relinquishment of the right to complain of the continuation of the licensing procedures which had been challenged in this suit. While this dispute as to what should be included in the release remained unresolved, appellants sold their theaters and advised the defendants that they would not settle the pending litigation.

At the hearing on their motion to dismiss, the defendants offered to accept releases without the controversial

[1] There was no formal writing and no formal acceptance. Neither was there a written settlement agreement. But the record warranted a finding that the negotiations reached a point where mutual assent had been expressed orally to settle the litigation for $10,000. We agree with the district court that the law requires no more formality and no greater particularity than appears here for the formation of a binding contract. **Cf. Taylor v. Stanley Co. of America,** 1932, 305 Pa. 546, 158 Atl. 157; **Schermer v. Wilmart,** 1925, 282 Pa. 55, 127 Atl. 315; Restatement, Contracts, §§ 19, 26.

When an analogous settlement problem arose in federal litigation under the patent law, this court looked to the contract law rule of the forum state to determine the law controlling the settlement agreement. **Peerless Weighing & Vending Mach. Corp. v. International Ticket Sale Corp.,** 1942, 126 F. 2d 239; **Accord, Ingalls Iron Works Co. v. Ingalls,** N.J. Ala. 1959, 177 F. Supp. 151, **aff'd,** 5th Cir. 1960, 280 F. 2d 423; **Beirne v. Fitch Sanitarium, Inc.,** S.D.N.Y. 1958, 167 F. Supp. 652; **Contra Greenberg v. Panama Transport Co.,** D. Mass. 1960, 185 F. Supp. 320, **rev'd on other grounds,** 1st Cir., 290 F. 2d 125, **cert. denied,** 1961, 368 U.S. 891. Here, we think the result on the merits is the same, whether a federal court applies its own understanding of federal contract principles or whether it is guided by Pennsylvania contract law, which a Pennsylvania court undoubtedly would apply to this settlement agreement having all of its significant contacts with Pennsylvania.

provision and the order of the court below required no more than that. Moreover, because of this concession by the defendants, the district court viewed the controversy over the terms of a release as immaterial to the decision of this case. We do not agree with this position because, if the parties had not entered into a binding agreement before the dispute over the terms of the release led the plaintiffs to reject the settlement, no future modification of the defendants' position could impose any obligation on the plaintiffs. Therefore, it must be decided whether there was an expression of mutual assent between the parties sufficient to create a binding settlement agreement before controversy arose about the inclusion of a particular provision in a formal release.

Had this been an action for damages only, without a prayer that the defendants be restrained from continuing or repeating the licensing practices of which the plaintiff complained, the essential feature of any undertaking to settle the suit for a stated sum would have been the plaintiffs' promise to forego a money claim, the only matter in controversy. Here the suit contained a demand for injunctive prohibition of future wrongful conduct as well as a claim for money damages for alleged past misconduct. In such circumstances a reasonable person agreeing, without any expression of limitation, to accept a sum in settlement of the litigation should and reasonably would understand that both aspects of the suit were covered by the settlement. Certainly, a defendant offering a sum in settlement of a suit asking, among other things, for an injunction against certain conduct, would not understand that a similar demand could be asserted the day after settlement. This reasonable understanding determines the meaning of the assent expressed by the parties here. Accordingly, the defendants were entitled to such a release as they proposed and their insistence upon it afforded the appellants no justifica-

tion for repudiation of [illegible] from their bargain. It is immaterial that, yielding to appellants' insistence, the defendants subsequently eliminated from the release a term upon which they might have insisted.

What has already been said also disposes of appellants' argument that counsel had no authority to negotiate a settlement permitting continuation of the conduct of which appellants had complained. It is not disputed that counsel was authorized to settle the litigation for $10,000. It follows that authority in general terms to settle the litigation would reasonably be understood as including authority to dispose of a claim for relief against continuation of the alleged wrong.

An altogether different problem is created by another fact not heretofore mentioned. When the defendants first proposed to settle these cases for $10,000, they indicated that they would pay this amount only if negotiations pending in eight companion suits should also result in settlement agreements.

The record shows that appellants' counsel, in agreeing to the proposed settlement, understood that the defendants' promise to pay $10,000 was conditioned upon the success of pending negotiations for settlement of the other eight suits. Therefore, it becomes necessary to decide whether the fact that the bargain was thus conditioned prevented a contract from arising so long as the condition remained unfulfilled. Unquestionably, a valid bilateral contract may arise even though the promise of one party to perform is qualified by a condition other than the performance of the other party. See RESTATEMENT, CONTRACTS, 77. Of course the condition must not make the promise illusory or enable the promiser to avoid performance at will. Cf. RESTATEMENT, CONTRACTS, 79. But here the condition is such that the defendants, both in legal theory and in practical contemplation, would have to abandon the pursuit of an im-

minent advantageous settlement of other substantial claims in order to avoid their promise to settle these cases. Their promise was not in any sense illusory and, in its conditional form, was acceptable to appellants. Accordingly, both parties were bound in accordance with the mutual assent that they expressed. *Atlas Trading Corp. v. S. H. Grossman, Inc.*, 3d Cir. 1948, 169 F. 2d 240, (agreement to sell truck, provided a certain government permit shall be obtained); *D. L. Walker & Co. v. Lewis*, 1937, 267 Ky. 107, 101 S. W. 2d 635, (agreement to buy stone from quarry if the purchaser shall obtain a certain public contract).* The Supreme Court of Pennsylvania has gone so far as to hold that the state constitution is violated by a statute invalidating any contractual condition under which a party promises to pay for work done only if an architect's certificate of approval shall be obtained. *Adinolfi v. Hazlet*, 1913, 242 Pa. 25, 88 Atl. 869. We are satisfied that the parties entered into a valid contract to settle, upon condition that the other suits also be settled. Thereafter, neither party was free to repudiate the agreement during the short period required to accomplish the settlement of the other suits.

Finally, in this court for the first time appellant has suggested that the factual issues involved in this pretrial motion should have been resolved by a jury. It is a sufficient answer that no demand was made in the court below for such a jury determination. Rather, appellants acquiesced in the disposition of the matter by the trial judge. Assuming the appellants could have demanded a jury determination of this controversy, we think they have effectively

* Professor Corbin has properly pointed out that a few cases admitting parol evidence of an oral condition qualifying a promise in a written contract on the ground that there would be no contract until the fulfillment of the condition may well have reached a proper result in the admission of evidence but upon an incorrect analysis of the contractual situation. 3A Corbin, Contracts §628, at 13 n 13

waived that right. See Rule 38 of the Federal Rules of Civil Procedure.

All of the appellants' contentions are rejected and we have concluded that no reversible error was committed in dismissing these cases as settled for $10,000.

The judgments will be affirmed.

McLAUGHLIN, *Circuit Judge*, dissenting:

These are antitrust actions by motion picture theatre operators against film distribution corporations. The question involved is whether they were settled.

The district judge found that words in the form of a release submitted by the defendants are "not objectionable by plaintiffs." The court goes on to hold that because the defendants are willing to accept a release without those words "* * * there is no need to litigate whether an appropriate release as contemplated by the oral settlement agreement."

The objectionable words in the submitted release are:

> "3. Main Line Theatres, Inc., agrees that its present availability and the present procedure pursuant to which it licenses motion pictures is reasonable."

That language if it had been accepted by plaintiff would have cut the heart out of their motion picture theatre operation. It was because the plaintiffs considered defendants' "procedure" in licensing motion pictures unreasonable to "its present availability" that they started these suits. The claim was for the damage sustained by plaintiffs arising out of the unreasonable conduct and action of the defendants. That was the claim that plaintiffs agreed to settle. But they never agreed in addition to that that they would wipe out their theatres' right to function in the future without according to their contentions [illegible]

by the unreasonable procedures of defendants. However, the latter at the time of the so-called oral agreement had every intention of including that important plaintiffs' claim in their settlement of the cases. It was a vital part of the release they drew and presented to the plaintiffs for execution. It was not until the plaintiffs persisted in refusing to accept the defense version of release that the defendants offered to waive the particular clause. The final position of the defendants was just that, namely, they waived what to them had been at the very least a substantial element of the settlement. There was and is no contention on their part that they had been trying to simply add the clause if possible or anything of that kind. The release sent plaintiffs by them was their idea of the contemplated settlement. It was never acquiesced in by plaintiffs. There was therefore no meeting of minds between the parties; no final settlement agreement. Later on, after plaintiffs had rejected the defense proposal as set out in the release, it was too late for the defendants to then attempt to waive their "reasonable procedure" language. At that stage defendants were in fact submitting a new offer of settlement. Plaintiffs declined this as they were entitled to do.

In the circumstances, the trial court could not validly hold that the plaintiffs must accept that new proposition. As I see it the order of the district court forcing plaintiffs into settlement should be set aside and the cases restored to the trial list for disposal of the antitrust claims on their merits.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

ORDERS OF U. S. C. A. 3 DENYING PETITIONS FOR REHEARING.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

Nos. 13508, 13509.

MAIN LINE THEATRES, INC., *Appellant in #13508;*
309 DRIVE-IN CORP., *Appellant in #13509,*
vs.
PARAMOUNT FILM DISTRIBUTING CORPORATION, et al.

SUR PETITION FOR REHEARING.

Present:
GOODRICH, McLAUGHLIN, KALODNER, HASTIE, GANEY and SMITH, Circuit Judges.

After due consideration the petition for rehearing in the above-entitled case is hereby denied. Judge McLaughlin dissents from the denial of the petition for rehearing in this case for the reasons expressed in his dissent to the opinion of the court in the matter which was filed January 16, 1962.

By the Court,
WILLIAM H. HASTIE,
Circuit Judge.

Dated: February 14, 1962.

JUDGMENTS OF U. S. C. A. 3.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,508.

MAIN LINE THEATRES, INC.,
Appellant,
vs.
PARAMOUNT FILM DISTRIBUTING CORPORATION, WARNER BROS. PICTURES DISTRIBUTING CORP., RKO RADIO PICTURES, UNIVERSAL FILM EXCHANGES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, COLUMBIA PICTURES CORPORATION, LOEW'S INCORPORATED, UNITED ARTISTS CORPORATION, and ALLIED ARTISTS DISTRIBUTING CORP.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: GOODRICH, McLAUGHLIN and HASTIE,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed with costs.

Attest:
IDA O. CRESKOFF,
Clerk.

January 16, 1962.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,569.

309 DRIVE-IN CORP.,
Appellant,

vs.

PARAMOUNT FILM DISTRIBUTING CORPORATION, WARNER BROS. PICTURES DISTRIBUTING CORP., UNIVERSAL FILM EXCHANGES, INC., TWENTIETH CENTURY-FOX FILM CORPORATION, COLUMBIA PICTURES CORPORATION, LOEW'S INCORPORATED, UNITED ARTISTS CORPORATION, BUENA VISTA FILM DISTRIBUTING CORP., ALLIED ARTISTS DISTRIBUTING CORP.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: GOODRICH, McLAUGHLIN and HASTIE,
Circuit Judges.

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

Clerk

January 16, 1962.